No. 285. 44.

Brief of Fisher for Appellee

Filed Mar. 22, 1897

Office Supreme Court, U. S.
FILED
MAR 22 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.
} NO. 285.

BRIEF FOR APPELLEES.

S. R. FISHER,
For Appellees.

HUTCHINGS PRINTING CO., AUSTIN.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL. } NO. 285.

The City of Austin and others, Appellees, move the Court to dismiss this appeal for want of jurisdiction of this Court to hear and determine the same, nothing appearing of record upon which its jurisdiction can be invoked. The appeal is direct from the Circuit Court and there is no fact apparent upon the face of the bill, or otherwise disclosed by the record, from or out of which the jurisdiction of this Court can arise.

S. R. FISHER,
For Appellees.

To

Counsel for Appellants.

Take notice that the above motion will be called up and submitted when the case is reached on the docket in its regular order.

S. R. FISHER,
For Appellees.

SUPREME COURT OF THE UNITED STATES.

Appeal From the Circuit Court of the United States, Western District of Texas.

PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.

NO. 285.

BRIEF FOR APPELLEES.

In April, 1882, the City of Austin was, and since then has been, a city "having more than ten thousand inhabitants," operating under a special charter granted by the Legislature of Texas in 1873, amended in 1883. This act, declared to be a public act, contains the following, among other, provisions touching the powers of the Mayor and City Council:

"7th. To construct water works, gas works and street railroads within and beyond the city limits or both; to provide the city with water and gas and to erect hydrants, fire plugs and pumps in the streets; to erect the necessary machinery, lamp posts, etc., for lighting the city within or beyond the limits of the city for the convenience of the inhabitants of the city and environs.

10th. To provide for the lighting of the streets and erecting lamps thereon.

20th. To provide for the prevention and extinguishment of fires and organizing and establishing fire companies.

To enact all ordinances which shall be necessary and proper for carrying into effect the powers specified.

* * * To levy an annual tax, not exceeding one per cent. upon the property within the limits of the city made taxable by law for State and county purposes; the money raised by said tax to be used for the current expenses and general improvement of the city.

* * * To raise money on the credit of the city for a special and definite purpose by issuing bonds of the city or otherwise; provided, the bonded debt of the city shall not, at any time, exceed $125,000.00, and the interest due on bonds and interest bearing warrants issued by the city of Austin, with interest accrued thereon, shall be at all times considered a part of the bonded debt of the city. To extend the bonded debt of the city be-

yond $125,000.00 shall only be done by a special act of the Legislature, or by consent of two-thirds of the tax-paying citizens voting at an election held for the purpose, after thirty days notice by the mayor by the authority of and in the method that may be prescribed by the city council. The bonds shall specify for what purpose they were issued and, when any bonds are issued by the city a fund shall be provided to pay the interest, and two per cent. per annum on the principal as a sinking fund to redeem the bonds or pay them at maturity, and said sinking fund shall not be diverted to or drawn for any other purpose, and the city treasurer shall honor no draft drawn on said sinking fund except to pay the interest or redeem the bonds for which such fund was provided. The sinking fund for the redemption of any bonds and the payment of the interest thereon, shall be invested, as fast as the same accumulates in interest bearing bonds of the United States or of the State of Texas, or of the City of Austin as the council may deem advantageous; and such bonds and the interest thereon shall be sold when necessary to pay or redeem the bonds for which the sinking fund was established."

Subsequently, as stated in the bill, the city passed the several ordinances looking to the extension of the bonded debt of the city in the sum of $1,400,000.00, and took action looking to the construction and maintenance of its own system of water works and electric lights, and afterwards, on the 17th day of April, 1891, was granted a new charter by the Legislature, set out as an exhibit to complainants' bill of complaint. (Trans. 68.)

At the time of the making of the contract referred to in the bill, the present constitution, which was adopted in 1876, was in full force and effect. The following, among other provisions relating to municipal and private corporations, are contained therein:

* * * * "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the Legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year, which shall exceed 2 1-2 per centum of the taxable property of such city and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per centum thereon. * * * * But no debt for any purpose shall ever be incurred, in any manner, by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least

two per centum as a sinking fund. (Secs. 5 and 7, Art. 11, Cons. 1876.)

"No private corporation shall be created except by general laws. Section 1, Article 12, constitution of 1876.

General laws shall be enacted providing for the creation of private corporations" * * (Section 2, article 12, Ib.)

The following provisions are also found in said instrument:

* * * * "And no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof. (Section 17, article 1, constitution.)

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." * * (Section 26, article 1.)

The City Water Company and the Austin Water, Light and Power Company were both incorporated and organized under a general law of the State of Texas, approved April 23, 1874 (General Laws, 1874, pages 120, *et seq*). This law was carried forward into the Revised Statutes.

Among other provisions therein contained is the following:

"All charters or amendments of charters under the provision of this act shall be subject to the power of the Legislature to alter or reform or amend the same. (General Laws, 1874, page 123; New Revised Statutes, Art. 650.)

This law also contained the following provisions:

"Any gas or water corporations shall have full power to manufacture, and to sell, and to furnish such quantities of water or gas as may be required by the city, town or village where located, for public or private buildings, or for other purposes, and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe (Section 59, General Laws, 1874, page 134; New Revised Statutes, article 705, old article 629); and

The municipal authorities of any city, town or village in which any gas light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, lots, lanes, squares and public buildings in any such city, town or village." (Section 60, General Laws 1874, page 135; New Revised Statutes, article 706, old article 630.)

With the facts as above stated, on the 3rd day of January, 1895, the appellants, in their capacity as bondholders of the City Water Company and of the Austin Water, Light and Power Company, its alleged successor, filed and exhibited in the Circuit Court of the United States for the Western district of Texas, their bill, praying an injunction against the City of Austin, its mayor, board of public works and other defendants, to restrain and perpetually enjoin the said City of Austin and other defendants from constructing and putting in operation a system of water works and electric lights.

Complainants alleged, in substance, that on the 13th of April, 1882, the City of Austin, made and entered into a contract with the City Water Company, a private corporation, incorporated under the general laws of the State (laws of 1874), whereby it conferred upon said company the right and privilege to lay pipes and water mains in the streets, alleys and public ways of the city, and obligated and bound itself to take water from the City Water Company, for a period of twenty years, for a stipulated price, to be paid therefor, and also authorized it for such period to furnish water to the inhabitants of said city at a price not to exceed a fixed limit.

Complainants alleged in effect that said contract—a copy of which was annexed to and made a part of the bill—was exclusive in its character, and that, during the continuance thereof, the city was without power or authority to contract for a water supply from any other source or sources, or to erect and maintain a plant of its own for the purpose of supplying its public wants and the wants of its inhabitants.

Complainants also claimed that, relying upon said contract and the benefits to be derived therefrom, the City Water Company and the Austin Water, Light and Power Company, its alleged successor, had invested large sums of money which would be lost, and the value of its plant entirely destroyed, or greatly deteriorated, should the city construct and maintain a system of water works of its own.

They also alleged that the City Water Company and its alleged successor, the Austin Water, Light and Power Company, in and by said contract, were granted an exemption from taxation during the entire period of said contract in consideration of the furnishing

to the city of a certain quantity of water free for certain designated public purposes.

Certain of the provisions of the charter of the City of Austin, of force and operative at the time of the execution of the alleged contract, were set out in the bill. The charters of the two water companies are not set out in the bill, nor are their powers anywhere enumerated; but, as they were both incorporated under the general law, it is clear that they can have and exercise such powers only as are authorized by the statute.

Complainants further charged that certain ordinances of the City of Austin authorizing and empowering the city council, upon obtaining the consent of the tax-paying citizens of Austin through an election held for such purpose, to issue bonds for the purpose of raising money with which to construct a system of water and electric light works, and the new charter granted the city by the Legislature in 1891—which ordinances and charter are annexed to and made part of said bill—impaired the obligation of the contract, and that said municipal ordinances and new charter were in conflict with section 10, article 1 of the Constitution of the United States.

The complainants moved for a preliminary injunction and, as is apparent from the note at the foot of the bill, an order was made by the Circuit judge appointing a day for hearing at New Orleans. (Trans. 33.) As matter of fact, the hearing at the time fixed was had, and after full argument, the preliminary injunction was denied on the ground that complainants' bill was without equity, and that the matters and facts complained of by them could be fully, completely and adequately remedied at law.

Subsequently, February 4, 1895, the defendants, appellees herein, demurred to said bill upon the following grounds:

* * * That said bill is without equity whatsoever, the matters and things therein complained of, if entitling complainants to relief of any kind, being cognizable in a court of law, and not in a court of equity—the said bill being wholly without equity. And these defendants say, and each of them says, that said bill is insufficient for the following, among other reasons:

First—Because the contract set out in complainants' bill is and ever has been void under the constitution and laws of the State of Texas, the City of Austin having no power under its charter or under the constitution and laws of the State of Texas, to enter into such contract.

Second—Because the City of Austin, at the time of making the alleged contract, had and now has express authority and power, under its charter and acts of incorporation to construct, build, maintain and operate a system of water and light works, and said right on the part of the city has been expressly adjudicated and determined by the Supreme Court of said State.

Third—Because the City of Austin has not now, and under the constitution and laws of the State of Texas, did not have at the date of the alleged contract, any power to exempt the property of the City Water Company or the Austin Water, Light and Power Company or any part thereof from taxation or commute taxes levied thereon, and the attempt so to do in said contract is and was void, and said city is now and was at the time of the alleged levy of said tax under obligation and required by the constitution and laws of said State, and the charter of said city, to impose taxes upon all alike, and it is not within the power of this or other court to exempt said property from taxation by enjoining the levy of taxes thereon, the constitution and laws requiring that taxation shall be uniform.

Fourth—Because even if said contract and the charter of the City Water Company and the Austin Water, Light and Power Company had in express terms sought to grant to or confer upon the City Water Company or the Austin Water, Light and Power Company the exclusive right to furnish the City of Austin and the inhabitants thereof, with water and light, or either, for public and private use, still, under the constitution and laws of Texas now in force and in force at the time of the making of said alleged contract and the granting of said charters, such exclusive privilege would have been subject to alteration, amendment or repeal by the Legislature.

Fifth—Because, prior to the making of said contract, the constitution of the State of Texas, adopted in 1876, in express terms provided, that no irrevocable or uncontrollable grant of special privileges or immunities should be made, and that all privileges and franchises granted by the Legislature, or created by its authority, should be subject to the control thereof, and these defendants say that, under and by virtue of an act of the Legislature of the State of Texas granting to the City of Austin a new charter, which is designated as Exhibit K in complainants' bill, express power and authority was granted to the City of Austin to issue bonds for the purpose of establishing and maintaining the system of water and light works now in course of construction by said city.

Sixth—Because if complainants have the right to sue for any alleged breach of said contract, such suit is not cognizable by and in a court of equity, that a plain, full and adequate remedy at law exists for any breach of the provisions of said contract which may result in damage to the complainants, and that

said contract, if valid, in express terms furnishes the measure of damage for any breach of the provisions thereof. For defendants say that, under the charter of said city, authority is given to annually assess and collect a tax of one per centum ad valorem on all property situated within said city for the purpose of paying for the current expenses and general improvement of the said city or its property and that such tax would be ample to meet and fully discharge any claim that complainants or said company might establish against said city as damages for the breach of said contract.

Seventh—Because there is nothing in said contract requiring the City of Austin to purchase the property and works of the City Water Company or the Austin Water, Light and Power Company. * * * * (Trans. 102.)

The demurrer coming on to be heard on the 8th day of March, 1895, in term time, the same was sustained by the Circuit Court, and complainants declining to amend the bill was dismissed and decree final entered on the ground that the bill was without equity. (Trans. 106.)

From this decree the complainants prayed and were allowed an appeal direct to this court. (Trans., 106.) The following is the only error assigned:

"And now come the appellants and assign error in this court, and say: The court erred in sustaining defendant's demurrer to complainants' bill of complaint on the ground that said bill is without equity and in dismissing said bill from the docket of the court." (Trans., 106.)

ARGUMENT:

The appellate jurisdiction of this court is limited and restricted to the class of cases specified in section 5 of the act of March 3, 1891, c. 517; and it is clear that its jurisdiction can not attach in this case unless the record discloses, (a) that the jurisdiction of the Circuit Court was in issue, or (b) that the constitution or a law of the State of Texas conflicts with appellants' contract and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainants' bill that there was involved in this case a Federal question, the determination of which was essential to the correct decision of the case.

The first contention, that the jurisdiction of the Circuit Court was in issue, can not possibly be maintained; for it is evident that the Circuit Court had jurisdiction, by reason of the diverse citi-

zenship of the parties, and that it exercised jurisdiction without question, hearing and sustaining a demurrer to the bill and dismissing the same for want of equity. This gave right of appeal to the Circuit Court of Appeals, but not to this court.

In *Smith vs. McKay*, it is said: "When the requisite citizenship of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches and whether the court should sustain the complainants' prayer for equitable relief or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction it could only be remedied by an appeal to the Circuit Court of Appeals." (161 U. S., 355.)

The position that the action of the Circuit Court in entertaining jurisdiction of an equity bill and in not dismissing it for want of equity, or in sustaining a demurrer to a bill and dismissing it for want of equity, puts in issue the jurisdiction of the Circuit Court under clause 1 of section 5 of the act of March 3, 1891, is no longer open to question. The rule now is that, if the Circuit Court had jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it had no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act and whether a case has been made out by the plaintiff in equity or at law is not sufficient to put in issue the jurisdiction of the court in the sense in which that phrase is used in the judiciary act. In the case just cited, the record disclosed that the defendants below appealed to this court upon the express ground that the Circuit Court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction and prayed that their appeal should be allowed and the question of jurisdiction certified to the Supreme Court, which was done.

In determining whether the record disclosed a case in which the jurisdiction of the Circuit Court was in issue, in the sense in which that phrase is used in the judiciary act, this court, through Mr. Justice Shiras, said:

"The question thus raised has never been directly decided by this court. It did present itself in the World's Columbian Exposition case, 18 U. S. App., 42. This was a case in which the Circuit Court of the United States for the Northern District of Illinois had granted, at the suit of the United States, an injunc-

tion against the World's Columbian Exposition, a corporation of the State of Illinois, restraining the defendant from opening the exposition grounds or buildings to the public on Sunday. From this decree an appeal was taken to the Circuit Court of Appeals for the Seventh circuit and that court, speaking through Chief Justice Fuller presiding, stated and discussed the question as follows: 'The appellees have submitted a motion to dismiss the appeal upon the ground that the jurisdiction of the Circuit Court was in issue; that the case involved the construction or application of the Constitution of the United States; that the constitutionality of laws of the United States were drawn in question therein; that therefore the appeal from a final decree would lie to the Supreme Court of the United States and not to this court, and hence that this appeal, which is from an interlocutory order can not be maintained under the seventh section of the judiciary act of March 3, 1891. We do not understand that the power of the Circuit Court to hear and determine the cause was denied, but that the appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity and not the want of power. The jurisdiction of the Circuit Court was therefore not in issue within the intent and meaning of the act.'

We regard this as a sound exposition of the law and applied to the case now in hand it demands a dismissal of the appeal on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainants' bill. The appellants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law." (161 U. S.)

But, even in the absence of this construction of the statute, the appellants could not invoke the jurisdiction of this court, under the first clause of section 5 of the act referred to, for the reason that the question of jurisdiction was not certified as imperatively required by the law. (Maynard vs. Hecht, 151 U. S., 324; Colvin vs. Jacksonville, 157 U. S., 368; United States vs. Jahn, 155 U. S., 109; Van Wagenen vs. Sewall, 160 U. S., 369; Chappel vs. U. S., 160 U. S., 499 and 507; Davis vs. Geisler, 162 U. S., 290.)

In this case, requisite citizenship and subject matter being sufficient to give the Circuit Court jurisdiction without reference to the presence of a Federal question, and the court having heard and determined the case upon its merits as any other equity cause that might come before it, without it appearing that a

Federal question was presented to, or ruled upon by the trial court, or entered into, or in any wise affected, the ruling disposing of the case, it would seem that the appeal in this instance was taken to revise the correctness of the judgment of the court in the exercise of its ordinary jurisdiction. This, as ruled in Cornell vs. Green, 163 U. S., 75, is not sufficient to invoke the jurisdiction of this court and the appeal should be dismissed without instituting an inquiry for the purpose of determining whether or not there was present a question of a federal nature upon which also the jurisdiction of the circuit court might have been founded.

If, however, this view be incorrect as applied to an appeal from a judgment or decree of a Circuit Court of the United States, then appellants are driven to the position that the case in the Circuit Court involved a Federal question in such way as to invoke and call for the exercise of jurisdiction by that court.

We proceed then to inquire whether complainants' bill discloses a Federal question.

Where it is sought to invoke the protection of the constitution against the impairment by subsequent legislation of any right, privilege or immunity claimed under a contract relied upon by complainants it must affirmatively appear, upon the face of their pleadings and from the facts alleged, that the legislation subsequently enacted by the State, or under its authority, will have the effect charged, and further that the determination of the question is essential to the correct disposition of the case. It will not be sufficient that a Federal question is incorporated into the record, if not essential to the jurisdiction and to a correct disposition of the case. Even if jurisdiction of the Circuit Court had been invoked on the sole ground that the case involved a Federal question, yet if the case could be disposed of without reference to the Federal question upon other grounds, it is submitted that such a case would not present a case to which the jurisdiction of this court would extend, but that the appeal would lie to the Circuit Court of Appeals and could only reach this court, if at all, from that court. Again, the Federal question must be evolved logically from the facts alleged. A mere naked statement that the legislation complained of impairs the obligation of a contract will not be sufficient. It is a mere statement of a legal conclusion and the court will look to the bill,

every fact alleged, and the constitution and laws of the State, in force and operative at the time of its making, to determine the existence or non-existence of a Federal question, also whether it was presented to and decided by the Circuit Court, and further whether its decision was essential to the correct disposition of the cause.

In *Starin vs. City of New York*, it is said:

"The character of a case is determined by the questions involved. Osborn vs. Bank, 9 Wheat, 738-824. If, from the questions, it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States within the meaning of that term as used in the act of 1875, otherwise not. Such is the effect of the decisions on this subject. Cohens vs. Virginia, 6 Wheat, 264, 379; Osborne vs. Bank, 9 Wheat, 138-824; Mayor vs. Cooper, 6 Wall, 252; Water Company vs. Keys, 96 U. S., 190-201; Tennessee vs. Davis, 100 U. S., 257-264; Ry. Co. vs. Mississippi, 102 U. S., 135-140; Ames vs. Kansas, 111 U. S., 449-462; Kansas Pacific Co. vs. Atchison, etc. Ry., 112 U. S., 414-416; Society vs. Ford, 114 U. S., 635-641; Pacific Railroad Removal Cases, 115 U. S., 1; see, too, German Insurance Co. vs. Winconsin, 119 U. S., 473; Carson vs. Dunham, 121 U. S., 421." (115 U. S., 257.)

In *Tennessee vs. Union and Planters' Bank*, this court, through Mr. Justice Gray, in determining whether or not the Circuit Court of the United States had jurisdiction, either original or by removal, of a suit as one arising under the constitution, laws or treaties of the United States unless that fact appeared by plaintiff's statement of his own claim, used this language:

"Even under the act of 1875, the jurisdiction of the Circuit Court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in Metcalf vs. Watertown, 128 U. S., 586, 589, in which Mr. Justice Harlan, after pointing out that the cases, in which it had been held sufficient that the Federal question upon which the case depended was first presented by the answer or plea of the defendant, were cases of removal, in which, therefore, the requisite jurisdiction appeared on the record at the time when the jurisdiction of the Circuit Court of the United States

attached, said: 'Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance.'" (152 U. S., 460, 461.)

In *Cornell vs. Green*, it was held that, in order to bring a case within the appellate jurisdiction of this court upon the ground that the case involves the construction or application of the Constitution of the United States, the Circuit Court must have construed the constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the constitution can be said to have been invoked in the court below when no construction or application thereof was either expressed or asked for. (163 U. S., 78.)

In *Ansbro vs. U. S.*, it is said:

"A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give this court jurisdiction under the fifth section of the act of March 3, 1891." (159 U. S., 697, 698.) See also Borgmeyer vs. Idler, 159 U. S., 400; Carey vs. Ry. Co., 150 U. S., 170; in re Lennon, 150 U. S., 395; Northern Pacific Ry. Co. vs. Amato, 144 U. S., 465-472; Sayward vs. Denny, 158 U. S., 180; Colorado Mining Co. vs. Turck, 150 U. S., 138; U. S. vs. American Bell Telephone Co., 159 U. S., 550 et seq.

In *New Orleans vs. Banjamin*, where the jurisdiction of the Circuit Court was invoked on two grounds: (1). That the case was one arising under the constitution of the United States; and (2), on diverse citizenship, the court said:

"When a suit does not really and substantially involve a dis-

pute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, then it is not a suit arising under the constitution. Shreveport vs. Cole, 129 U. S., 36; Starin vs. New York, 115 U. S., 248, 257; Gold Washing and Water Co. vs. Keyes, 96 U. S., 199.

The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually and not potentially arising, and jurisdiction can not be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the State courts in the first instance, the presumption being, in all cases, that they will do what the constitution and laws of the United States require, Chicago and Alton Railway Co. vs. Wiggins Ferry Co., 108 U. S., 18; and if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the constitution by the twenty-fifth section of the judiciary act of 1789, and has adhered to it in subsequent legislation." (153 U. S., 424.)

In *City of Fergus Falls vs. Fergus Falls Water Company*, decided by the Circuit Court of Appeals for the Eighth Circuit, Fergus Falls Water Company brought an action against the City of Fergus Falls upon a contract. It alleged in its complaint that the city made a contract to pay certain water rents for supplying the city with water; that it had complied with the contract and furnished the water, that the city had paid the rents until its city council passed a resolution that the contract was annulled and cancelled, and that it would no longer pay rents thereunder; that, from the date of the passage of that resolution, the city had not paid the rents, and that the resolution was a law impairing the obligation of a contract. It was held, first, that the allegation that the resolution was a law impairing the obligation of the contract was surplusage; and, second, that even if the averments of the complaint had brought the case within the jurisdiction of the Circuit Court, the suit should have been dismissed when it appeared upon the trial, as it clearly did, that the suit did not arise under the constitution and no Federal question was involved, but only the question whether the city had authority under the laws

of Minnesota to enter into the contract in suit. In the progress of the opinion, Caldwell, Circuit judge, said:

"The defendant challenged the jurisdiction of the Circuit Court at every stage of the case, and that is the only question we find it necessary to consider. The jurisdiction is attempted to be maintained upon the ground that the case is one arising under the constitution of the United States. But clearly this is not so. The complaint shows the suit to be one to recover for water furnished by the plaintiff to the city under the contract set out in the complaint. In a word, it is a suit to recover for the breach of an alleged contract to pay for water. It does not differ in any respect from a suit to recover for water supplied to a private consumer. It is in no wise different from a suit brought by one individual or private corporation against another individual or private corporation to recover for fuel, merchandise, or other property alleged to have been sold and delivered by the one to the other under a contract to pay a stipulated price therefor. In all such cases the cause of action is not grounded on any right derived from the constitution of the United States, but arises out of the contract between the parties. The right to contract and the obligation of contracts antedate the constitution, and were not derived from it. An action, therefore, to recover upon the contract in suit, or to enforce its obligation, is not a suit arising under the constitution. But it is said that the complaint sets up that the defendant, by resolution of its council, declared the contract null and void, and is in contravention of the constitution of the United States. Conceding all this to be so, it does not serve to make the plaintiff's cause of action one arising under the constitution. Notwithstanding this averment, it is indisputable that the complaint shows the plaintiff's suit is based upon and arises out of, the contract in suit, and not under the constitution." (72 Fed. Rep., 874, 875.)

Applying these well recognized principles to the case at bar and it would seem clear that the case it not a case arising under the constitution of the United States, that no question of a Federal nature is involved, and certainly that the legislation complained of, the municipal ordinances passed under the authority of the Legislature and the new charter, in no wise impairs the obligation of the contract relied upon; in other words, that appellants have no contract falling within the constitutional inhibition against impairment of contract obligation, the contract not being exclusive in its character and imposing upon the City of Austin no obligation to refrain from the construction and maintenance of wa-

ter works or from entering into a contract with some other company or companies for the furnishing of water. (Nalle vs. City of Austin, 85 Texas, 520; Long vs. Duluth, 51 N. W., 913; Syracuse Water Co. vs. City of Syracuse, 116 N. Y., 167; Rockland Water Co. vs. Camden, etc. Water Co., Maine, 1 L. R. A., 388.) The case does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution upon the determination of which the result of the suit depends. Exclusiveness of the contract would seem to be absolutely essential and necessary to the existence of a Federal question within the contract provision of the constitution; that is, the contract, if one within the competency of the city to make, must, in order to fall within the protection of the constitution, be exclusive to the extent of conferring upon the City Water Company and, if assignable, its successor, the exclusive right or privilege of maintaining its mains and pipes in the streets and public ways, and the exclusive right or privilege of furnishing water to the city, and its inhabitants during the entire period of the contract. The contract, by its terms, is not exclusive, and this court will not so construe it unless the city had the power to make an exclusive contract, and not then in the absence of explicit provisions to that effect in the contract itself. (Charles River Bridge vs. Warren Bridge, 11 Pet., 420; Stein vs. Bienville Water Supply Co., 141 U. S., 67; Turnpike Co. vs. City, 3 Wall, 210; Hamilton Gas, etc. Co. vs. Hamilton, 146 U. S., 258; Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep., 531; Re Brooklyn, 143 N. Y., 596; s. c., 26 L. R. A., 273; Syracuse Water Co. vs. City of Syracuse, 116 N. Y., 167; s. c., 5 L. R. A., 551; Brenham vs. Brenham Water Co., 67 Texas, 542; Long vs. Duluth, Minn., 51 N. W. Rep. 913; State vs. Cincinnati Gas, etc. Co., 18 Ohio St., 262; Norwich Gas Co. vs. Norwich City Gas Co., 26 Conn., 19.)

Rockland etc. Water Co. v. Camden etc. Co. (Maine) 1 L.R.A. 394, 396.

The charter of the City of Austin did not authorize its council to make an exclusive contract with the City Water Company or to grant it an exclusive franchise. The charter of the City Water Company did not confer upon it an exclusive franchise to furnish water to the City of Austin and its inhabitants, the charter conferring upon the Water Company only such powers as were conferred by the general law upon water companies, and the right to an exclusive privilege is not given in the general law. Besides, the constitution and laws of the State of Texas, in force

Rockland etc. Water Co. v. Camden etc. Co. 1 L.R.A. 388, 394; Lehigh Water Co. v. Easton, 121 U.S. 391; Jackson Co. Horse Ry. Co. v. Interstate Ry. Co. 24 Fed. rep. 306)

at the time said City Water Company was incorporated and at the time the contract was made, forbade the granting of an exclusive franchise or contract of this character. (Brenham vs. Brenham Water Works, 67 Texas, 542; Altgelt vs. San Antonio, 81 Texas, 436; Nalle vs. City of Austin, 85 Texas, 520, 549.)

If it be assumed that the contract is valid, or valid as to some of its provisions, it is apparent that the obligation imposed by the contract upon the city is simply that the city shall pay a specified rental, for a certain number of hydrants, during a given period, and not that the city may not, if it so elect, at any time, either before or after the limit named, construct and maintain water works of its own or grant the privilege to other parties. (Nalle vs. City of Austin, 85 Texas, 522, 547, 548; Long vs. Duluth, 51 N. W., 913; Syracuse Water Co. vs. Syracuse, 116 N. Y., 167; Turnpike Co. vs. City, 3 Wall, 210; Hamilton, etc. Co. vs. Hamilton, 146 U. S., 258; 69 Fed. Rep., 671, 672.)

But, if the contract should or could be held to be exclusive, then, by express adjudications of the Supreme Court of Texas, in Brenham vs. Brenham Water Works, 67 Texas, 542; in Altgelt vs. City of San Antonio, 81 Texas, 436, and in Nalle vs. City of Austin, 85 Texas, 520, the contract is absolutely void, if not *in toto*, certainly so far as its exclusive feature is concerned. These decisions were made by the Supreme Court of Texas in passing upon and determining the powers, under the constitution and laws of Texas, of its municipal corporations, whether operating under charters similar to the charter of the City of Austin or under the general law. They show a construction, by the Supreme Court of Texas, of its local laws conferring powers upon municipal corporations, and also a construction and application of the constitution of the State to such laws and contracts made thereunder. (Claiborne vs. Brooks, 111 U. S., 400, 410; Detroit vs. Osborne, 135 U. S., 492, 497.) The contract involved in the Brenham case was almost identical in terms with the contract here exhibited, and the court there distinctly held that the contract was void, because the city was vested with no express power under its charter to grant an exclusive privilege, because a contract of such character was in legal effect a monopoly, beyond the power even of the Legislature to make, and because it was beyond the power of the city to make a contract that would disable it, in future, from con-

trolling, as it might deem best, its municipal affairs. This ruling was adhered to in the Altgelt case. In the Nalle case, which was a suit by a tax-payer to enjoin the collection of the tax assessed and levied for the purpose of paying interest upon the water works bonds issued under the ordinances herein assailed, the complainant, as one of the grounds for the relief he sought, alleged that, at the time of the passage of the ordinances for the election and issue of the bonds by the city, it had a contract (the very contract here relied on) with a private corporation, by which it was provided with an adequate supply of light and water, and that said corporation was able and willing to carry out its contract and to supply all the light and water which the necessities of the city required. It was insisted that, by such contract, the city had exhausted its power to procure water and light from any other source. The Supreme Court, in answering this contention, said:

"It seems to us the statement of the proposition carries with it its own refutation. In this state, no city can grant an exclusive right to furnish either the water or lights. Brenham vs. Water Company, 67 Texas, 544. The argument comes down to this that, whenever a city has made a contract with a company able and willing to supply it with the necessary water and lights—terminable it may be at the city's option and burdensome in its terms—its power is exhausted and any attempt to procure water and light from any other means is *ultra vires* and void." (85 Texas, 549, 550.)

The court further distinctly ruled that the power of the City of Austin, to construct and maintain a system of water and light works was fully conferred and that the power in this case had been properly exercised.

These decisions, it is submitted, are binding upon and will be followed by this court, although it might, if exercising its independent judgment in their absence, decide differently. (Claiborne vs. Brooks, 111 U. S., 400, 410; Detroit vs. Osborne, 135 U. S., 492, 497, 498, 499; Flash vs. Conn, 109 U. S., 371; 144 U. S., 408, 422; Dupont vs. Pittsburg, 69 Fed. Rep., 13; N. Y. L. E. etc. Ry. Co. vs. Pennsylvania, 158 U. S., 435; Laredo Imp. Co. vs. Stevenson, 16 Fed. Rep., 632; Elmwood Township vs. Marsey, 92 U. S., 289, 294; Fairfield vs. Gallatin Co., 100 U. S., 47 ½; Louisiana vs. Pilsbury, 105 U. S., 278, 294; Randall vs. Brigham, 7 Wall. 523;

Ottawa vs. Perkins, 94 U. S., 260; Post vs. Kendall Co., 105 U. S., 667; Carroll Co. vs. United States, 18 Wall, 71, 82; Smith vs. Kernochen, 7 How. 198, 219.)

In *Claiborne County vs. Brooks*, it was said:

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." (111 U. S., 410.)

In *Detroit vs. Osborne*, the court quoted, with approval, the above extract and further said:

"If it is a matter of local law, that law is obligatory upon the Federal courts. It must be conceded that this adjudication * * * is not in harmony with the general rule in this country, * * * nor in accord with the views expressed by this court. * * * But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of Federal Law, and the intepretation placed upon it by the Federal courts, it has been equally strenuous to uphold the decisions by State courts of questions of purely local law." (135 U. S., 497, 498.)

Again, if the contract be exclusive, then, without reference to whether it created a monopoly under section 26, article 1, Cons. 1876, it would be void under section 17 of said article, declaring that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof." This provision prohibited any

grant of an exclusive or special privilege by the Legislature, or under its authority, and if the city, nevertheless, attempted to confer such a privilege it would be within the power of the Legislature, or of the municipality exercising a part of its delegated sovereignty, to withdraw such special or exclusive privilege. This, it is submitted, was done when the city passed the legislation complained of, and if this were not sufficient, certainly the granting the new charter by the Legislature in 1891, conferring, in express terms, upon the city the right to construct, maintain and operate the present system of water works, authorized under the challenged ordinances, would have such effect. (Par. 46, sec. 57, char., Trans. 87.) If the contract was and is void, either in its entirety or as to the exclusive feature, then there was no contract to create an obligation and, therefore, no obligation which could be impaired by any subsequent legislation.

It is to be observed, in this connection, that the City Water Company, the Austin Water, Light and Power Company, its alleged successor, and the City of Austin; all derived their powers from the Legislature, through enactments and articles of incorporation made under and subject to the authority of the constitution of 1876, which was of force and operative when it is claimed that the City Water Company and the city undertook to contract for a water supply for the city and its inhabitants; and if the act of the city, in attempting to confer upon the Water Company the privilege, for a long term of years, of furnishing the city and its inhabitants with water, was the act of the State, through the city as its legally appointed agent, and such privilege was intended to be exclusive of the right of the city, through works of its own, or otherwise, to make other arrangements for a further supply, but the ordinances of the city complained of can not be held to be an exercise of the reserved power of the Legislature to revoke or control the privilege conferred—then, it is submitted, that the act of the Legislature of 1891, granting to the city a new charter and expressly conferring upon it the right to "erect, construct, build and operate a water and electric light system to supply the city and its inhabitants with water and electric light by constructing and maintaining a reservoir of water in and about the channel of the Colorado river, within and without the city limits, by erecting a dam across the same where such dam is now being constructed,

to serve as a reservoir and to furnish power to operate an electric light system and to build such other reservoir as may be necessary * * * to supply the higher portions of the city with water" * * * —unquestionably operated as and was a revocation of any exclusive or special privilege granted to the City Water Company, or its alleged successor, and conferred upon the City of Austin, as it might have conferred upon any other company or person, the right and power to erect, maintain and operate a rival system of water works. This, it would seem, was a clear exercise by the Legislature of its constitutional power, and impaired no obligation arising out of the contract.

This view seems to be in entire harmony with the decision of this court in *Hamilton Gas Light Co. vs. Hamilton City.* There the gas company, upon an attempt by the city to construct its own gas works, invoked against an ordinance of the city the protection of the impairment clause of the Federal Constitution, and also the clause declaring that no State shall deprive any person of property without due process of law, and it became necessary for this court to examine and pass upon certain provisions of the constitution of Ohio, of force when the company's charter was extended, similar to section 17 of article 1 of the Texas Constitution, above quoted. It was held that these provisions conferred upon the Legislature the power to alter or revoke an exclusive privilege, and that the exercise of such power could not be held to impair the obligation of a charter constituting a contract, which must be deemed to have been accepted subject to the reservation of power to alter or revoke.

The court, through Mr. Justice Harlan, said:

"By the constitution of Ohio, adopted in 1851, it was declared that 'no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly;' that the 'general assembly shall pass no special act conferring corporate powers;' and that 'corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.' Sec. 2, Art. 1; Secs. 1, 2, Art. 13. If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas-light to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the

power of the Legislature, reserved by the State constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute, providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privilege, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation." (146 U. S., 269, 270.)

It is further submitted that allegation of failure on the part of the city to take water from the City Water Company is nothing more nor less than an allegation of a breach of contract, for which the party aggrieved would be entitled to have his appropriate remedy, but such action on the part of the city would not bring the contract within the protection of the constitution—it would present no Federal question. The fact that the city, whatever its motives, has, during the life of the contract, constructed and maintains a rival system of water and light works, the effect of which may be to greatly deteriorate or damage the operative value of the property of the City Water Company and decrease its revenues, would present no Federal question. (13 Wall, 68, 70; 146 U. S., 268; 3 Wall, 210-213.) Such conduct on the part of the city might, perhaps, present facts giving rise to an estoppel *in pais* and the Water Company might, in a proper case, be entitled to relief, but this, it is submitted, would simply present a matter of ordinary cognizance by a court which, if tried in the Circuit Court of the United States, would be appealable to the Circuit Court of Appeals; it would involve merely a matter of ordinary jurisprudence and would, in no sense, present a Federal question that could be the foundation of the jurisdiction of this court. Nor would the failure of the city to exercise its option to purchase the plant and property of the City Water Company, under the provisions of the contract, before itself proceeding to construct and maintain its own plant, present any such question, nothing in the contract binding the city to buy the Water Com-

pany's property—the option to buy imposing no obligation. (Syracuse Water Co. vs. Syracuse, 116 N. Y., 167, 187; Colby University vs. Canandaigua et al., 69 Fed. Rep., 671, 672.)

II.

If, however, the court is of opinion that it has jurisdiction, it is insisted that the decree is correct and should be affirmed.

The objections urged against the contract on the motion to dismiss—all of which are confidently relied upon—will not be gone over, but some additional matters, apparent upon the face of the bill and to which the demurrer applies, will be presented against the validity and binding force of the contract; among them, the tax exemption provision, the assignability of the contract, the effect of the transfer by the City Water Company, in 1887, to the Austin Water, Light and Power Company, of all its properties, rights, franchises, privileges, etc., and the abandonment by it, from and after that time, of the purpose for which it was incorporated.

The exemption from taxation provided for in the contract, or rather the commutation of taxes for water, is and ever has been utterly void under the constitution of Texas, (Austin vs. Gas Co., 69 Texas, 180; Altgeld vs. City of San Antonio, 81 Texas, 436) and being an interpretation of the constitution of Texas and of the charter of the City of Austin is binding here. The decision is in line with similar decisions in other states, and is so manifestly correct that it would seem not to require the support of authorities. (City of New Orleans vs. New Orleans Water Works Co, 36 La. Ann. 432; City vs. Lafeyette Ins. Co., 28 La. Ann. 756; La. Cotton Mfg. Co. vs. City, 31 La. Ann., 440; Brewer Brick Co. vs. Brewer, 62 Me., 62; S. C., 16 Am. Rep., 395; State vs. Hannibal, etc., R. C., 75 Mo., 209; Cartersville Water Works vs. Cartersville, 89 Ga., 689.) It is clear that all of the allegations of the bill relative to the contract for lighting the city, which contract the bill shows had expired before the filing thereof, are irelevant to any issue in this cause, and if complainants were, in any manner, entitled to an exemption from taxation, it would be upon only so much of the property of the City Water Company as was necessarily and exclusively used for the purpose of carrying out the water contract, and further, if the exemption from taxation could, in any way, inure to the benefit of the City Water Company, it was personal to

that company, and would not pass by assignment or transfer. (Chesapeake and Ohio Ry. Co. vs. Miller, 114 U. S., 176; Morgan vs. Louisiana, 93 U. S., 217; R. R. Co. vs. Pendleton, 156 U. S., 667, 673; Picard vs. R. R. Co., 130 U. S., 637; 112 U. S., 609.)

As already shown, the city had abundant authority, at the time of entering into this contract, to construct and maintain water works of its own, but under the law such works could only be constructed out of revenues of the city to be derived from taxation specially levied for that purpose. If, therefore, the contract with the City Water Company was not exclusive and if, notwithstanding that contract, the City of Austin had the power and authority to establish a rival water company, so that its inhabitants might purchase water from whomsoever they might choose, then the City Water Company necessarily took its contract subject to the contingency that the city, in the exercise of its power, would tax the property of the City Water Company as if it were the property of any other citizen, and the exemption sought to be granted by the contract being absolutely void, the City Water Company was charged with legal notice of its nullity, and can not now get the benefit of it, either directly or indirectly; because, if a municipal corporation is prohibited by the organic law from bartering away its taxing power, directly or indirectly, there is no form or kind of agreement or estoppel by which the constitutional prohibition could be rendered inoperative and no kind of equity, which would practically amount to an annulment of the constitutional provision, could be generated that a court could enforce. We submit that this proposition is too clear to need authorities to support it.

It further appears, from distinct and affirmative allegations in the bill (Par. 21, Trans. 14) and from the exhibits annexed to and made part thereof, (Trans. 50 to 57) that, in 1887, the City Water Company, with whom the city dealt in the matter of the contract here relied upon, sold, transferred, set over and surrendered to the Austin Water, Light and Power Company all its properties rights, powers, franchises and privileges, including its entire plant and structure as a water works, and thereafter ceased to perform any of the functions for which it was incorporated or to carry out or perform any of the obligations imposed upon it under the said contract. (Par. 23, Trans. 16.) As heretofore stated, the powers of the City Water Company and of the

Austin Water, Light and Power Company are not specifically set out, but they were incorporated under the general laws and have only such powers as are authorized by statute to be conferred and exercised. The power to transfer and set over to another corporation or person all the property, powers, privileges and franchises necessary and essential to carry out the purposes of the grant thereby disabling itself from further exercising its functions, did not exist and could not, if so attempted, be granted to it by the City of Austin, by original authorization or subsequent ratification. The City Water Company had no authority to make the transfer, and the Austin Water, Light and Power Company had no authority to receive it. A corporation, created to supply water to the inhabitants of a city under the general incorporation laws, is subject to control by the State in the same manner and to the same extent as railroad corporations. The business of such a corporation is a public one, affecting the general welfare and interests of the whole community in which the company seeks to do business; and, in recognition of the public nature of the enterprise, such corporations can lawfully be given, and in Texas are given, the right to exercise the power of eminent domain. Any transfer by such a corporation, as was attempted by the City Water Company in this case, of its public privileges and franchises is utterly void, whether made by lease, sale or otherwise, and such attempted transfer not only conveys no title, but in addition gives ground for forfeiture of the charter of the corporation so attempting to convey. (See City Water Company vs. State of Texas, *ex rel.* Frank Hamilton, 33 S. W., 259; see, also, G. C. & S. F. Ry. Co. vs. Morris, 67 Texas, 692; East Line and Red River R. R. Co. vs. State of Texas, 75 Texas, 434; Thomas vs. Ry. Co., 101 U. S., 71; Gibbs vs. Gas Co., 130 U. S., 397; Chicago Gas Co. vs. Gas Light Co., 2 Ann. St. Rep., 124; S. C., 121 Ill., 530.) In fact it appears, from the reported decisions of the Supreme Court of Texas, that the City Water Company—with whom the contract here is alleged to have been made—was, before the filing of this bill, proceeded against by the State of Texas, and its charter forfeited, because of the transfer aforesaid to the Austin Water, Light and Power Company, whereby it incapacitated itself from carrying out the purpose of its incorporation, which was the supplying of the City of Austin and its inhabitants with

water for public and private purposes. It is, therefore, contended that the Austin Water, Light and Power Company got no title to this contract, and the City of Austin not being the sovereign power could not, in any manner, consent to a violation of a public law of the State of Texas on this subject, and that, however much it may have recognized the Austin Water, Light and Power Company, such recognitions can have no force or validity against the effect of the public law of the State. The dissolution of the City Water Company, organized for a public purpose, carried with it a destruction of all its franchises and rights of a public nature, and left it a concern in liquidation, for its assets to be disposed of for account of whom it may concern, and the bondholders, complainants here, who hold their rights subject to the charter and to the existence of the City Water Company, can not have any greater right than has the City Water Company itself. The bondholders of the Austin Water, Light and Power Company can not, in any event, have any greater rights than had the corporation under which it holds, and as no title to this franchise and contract could be conveyed by the City Water Company to the Austin Water, Light and Power Company, such bondholders are without any standing in court, either at law or in equity.

In *City Water Company vs. State*, supra, the court, in rendering judgment affirming the judgment of forfeiture of the charter of the City Water Company, said:

"This is a proceeding, in the nature of a *quo warranto*, in which a judgment was rendered forfeiting the charter of the City Water Company. * * * * * The action of the trial court in overruling appellant's plea in abatement, urging that a receiver previously appointed by another court, and in possession of appellant's tangible property, was a necessary party to this suit, is the only question about which any member of this court had any doubts. We certified that question, and the Supreme Court held that said receiver was not a necessary party. (32 S. W., 1033.) On the other questions involved, the court below filed conclusions of fact and of law. The former are acquiesced in by the parties and adopted by us. The latter are disputed by appellant, but we think they are correct, and here insert them as expressing our views, viz.:

1. That, while it is true the said City Water Company comes within the class denominated by our statutes as private corporations, its business and the purposes for which it was incorporated are of such public character as to make it a quasi public corpora-

tion, subject to be governed by the rules of law applicable to such corporations. (Foster vs. Fowler, 60 Pa. St., 27; Lumbard vs. Stearns, 4 Cush, 62; Burden vs. Stein, 27 Ala., 104; Kane vs. Mayor, etc., of Baltimore, 15 Md., 240; Gardner vs. Village of Newburgh, 2 Johns. Ch., 162; Wayland vs. Commissioners, 4 Gray, 500; Haugen vs. Water Co., Or., 28 Pac., 246; Mor. Priv. Corp., secs., 1114, 1129; I Beach Corp, secs. 2, 3; Waterworks vs. Schottler, 110 U. S., 354, 4 Sup. Ct., 48; Gibbs vs. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; City of Rushville vs. Rushville Natural Gas Co., Ind. Sup., 28 N. E., 856; Rev. St. arts. 629, 630; Acts 22d. Leg. Assem. p. 172.)

2. That the failure to elect directors or officers, or hold any meetings of directors or officers, or perform any corporate act, for nearly eight years, and the attempted sale and surrender of all its property to another corporation, rendering itself incapable of performing its corporate duties, must be regarded as willful violations of corporate duties, and sufficient grounds to entitle the State to a forfeiture of its charter. (State vs. Southern Pac. Ry. Co., 24 Tex., 131; 4 Am. and Eng. Enc. Law, 304; Railway Co. vs. Morris, 67 Tex., 692; 4 S. W., 156; East Line and R. Co. vs. State, 75 Tex., 434, 12 S. W., 690.)

3. The fact that the Austin Water, Light and Power Company is furnishing the citizens of Austin and vicinity with water, as the pretended successor to the City Water Company, can not be held to deprive the State of the right to forfeit the charter of the City Water Company for willfully failing to perform its corporate duties, and wilfully attempting to sell all its corporate property, and delivering the possession of same to the pretended purchaser, which disabled it to perform the duties it owed to the public.

4. That under the facts of this case, the charter of the City Water Company ought to be declared forfeited, and judgment will be rendered for the plaintiff accordingly. No reversible error has been pointed out, and the judgment will be affirmed."

An application was afterwards made by the respondent, the City Water Company, to the Supreme Court of Texas for a writ of error to reverse the judgment of forfeiture. It was refused. (See list of cases in which writs of error were denied, in the list published in 33 S. W. on page xvii preceding page 1.) This stamps the judgment of forfeiture with the approval of the Supreme Court.

The carefully considered and learned opinion of the Court of Appeals of New York in the case of *Syracuse Water Co. vs. City of Syracuse*, 116 New York, bears so directly upon the questions involved that liberal quotation therefrom will be made.

Actions were brought by the Syracuse Water Company against the City of Syracuse and against the city and the Central City Water Works Company to restrain the city from granting to the Central City Water Works Company the right to place pipes or other structures in the City of Syracuse with a view to supply it with water, and for the purpose also of restraining the city and the Central Water Works Company from exercising any right or privilege which the city, through its council, had by resolution sought to give to the defendant company and which the latter had assumed to take.

The actions rested upon the charge made by the plaintiff that the defendants were proceeding to invade its rights, which it claimed were founded upon the possession by it of an exclusive right or franchise to furnish the city with water.

In disposing of this claim adversely to the plaintiff and denying the injunction, the court said:

"* * * The plaintiff was incorporated by laws of 1849, chap. 224, and ever since then it has furnished water to the city and its inhabitants. To do that was the purpose of its creation, and it was fully provided by its charter with the powers essential to that service, amongst which was that of eminent domain. The franchise granted to the plaintiff embraced all the powers, privileges and immunities within the charter, and constituted a contract between the State and the plaintiff, and in the exercise of the powers so granted the latter was entitled to protection. It follows that if within the franchise, granted by the State to the plaintiff, was the exclusive right to supply the City of Syracuse with water, the defendants should be enjoined from proceeding, as they are attempting to proceed, to interfere with or impair such right. (St. Tammany Water Works vs. New Orleans Water Works, 120 U. S., 64; New Orleans Gas Light Co. vs. Louisiana Light and Heat Co., 115 U. S. 650; New Orleans Water Works Co. vs. Rivers, 115 U. S., 674; Louisville Gas Co. vs. Citizens Gaslight Co., 115 U. S., 683.) * * * * * *

The company evidently was created solely for the purpose of supplying water to the city for the use of it and its inhabitants; and, so far as appears, the city then had no means for such supply other than such as had been possessed by Teall and his associates, and such as it may have been contemplated the plaintiff would provide. It must be assumed that the Legislature was advised of the situation, and that the franchise was granted for all the purposes within the provisions of the charter.

* * * The construction and effect to be given to the contract between the State and the grantee of a franchise have been

the subject of much discussion, and the view of Chancellor Kent at one time was that although 'the creation of the franchise be not exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry, bridge or turnpike or railroad, that the government will not either directly or indirectly interfere with it so as to destroy or materially impair its value. * * * All grants or franchises ought to be so construed as to give them due effect by excluding all contiguous competition which would be injurious and operate fradulently upon the grant.' (3 Kent, 459; Newburgh and C. Turnp. Co. vs. Miller, 5 Johns. Ch., 101.)

Whatever support that rule of interpretation and effect may have in reason or propriety, it is not now available to that extent for the beneficial protection of the grantee in the exercise of his franchise, but on the contrary, public grants are to be so strictly construed as to operate as a surrender of them by the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the State in imparting to its citizens or corporations powers and privileges of public charter. And, therefore except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be to those taken by the prior grantee.

The important leading case to that effect in this country was Charles River Bridge vs. Warren Bridge, 11 Pet., 420, where was sustained the grant of the right to erect a bridge over the Charles river near one which had been constructed over the same river pursuant to prior grant from the State of Massachusetts, although it produced a competition practically destructive of the value to the grantee of such prior franchise. And this was put upon the ground, resulting from the declared rule of construction of such grants, that they should be strictly construed as against the grantee, and that nothing should be taken by inference or presumption to enlarge their import. The court held that the State had relinquished its sovereignty so far only as the purpose to do so was expressed in the prior grant, and therefore as it had not by it made the franchise exclusive in that locality or denied to itself the power to grant similar privileges to others, there was no violation of the legal rights of the prior grantee produced by the subsequent one complained of. Although that case was determined by a divided court, and it does not very clearly appear by the report of it upon precisely what ground all the members of the majority placed their concurrence in the result, the doctrine there announced by Mr. Chief Justice Taney has since then been treated by that court as established. (Lehigh Water Co. vs. Easton, 121 U. S., 391.)

* * The plaintiff's charter does not in terms expressly de-

clare that the contemplated powers and privileges to supply water to the city were exclusively with the plaintiff, nor does it in that manner deny to the State the right to make other similar grants for that purpose. And the same may be said of the acts of 1821, 1825 and 1834, through which the plaintiff, by the conveyance to it, claims to have derived some rights in that respect. The plaintiff undoubtedly took, by such conveyance, all the privileges and property which Teall possessed for the purpose of furnishing such supply, with the power, added by its charter, of taking water from any suitable sources; and to enable it to do so, it was vested with the right of eminent domain. These several statutes must be treated *in pari materia* with a view to their purpose and effect, and to ascertain the rights taken by the plaintiff through them.

When the trustees, representing the unincorporated and the incorporated Village of Syracuse, and subsequently when Teall, assumed the power pursuant to the statute to furnish water, there was no other means of supply in contemplation, and such evidently was the situation when the plaintiff took its charter and became vested, by the conveyance, with all the rights and property then existing applicable and applied to that purpose. Upon the faith of that apparent situation, Teall, and afterwards the plaintiff, proceeded to provide the means to supply water to the municipality and its inhabitants, and in that behalf expended much money in the plant for its accomplishment. It is therefore, with some force urged that these are considerations bearing upon the practical construction of the relation between the plaintiff and the city, produced by the statutes and the proceedings had under them, which disable the latter from denying to the plaintiff, in any manner otherwise than that prescribed by the statute, the right exclusively to continue to supply water there. And much reliance is by the plaintiff's counsel placed upon the sixteenth section of its charter, which required the plaintiff, when requested, to furnish water to the common council of the city for extinguishing fires and other purposes. This provision was made available by request pursuant to it in April, 1851, and afterwards contracts to supply water for certain periods were made between the plaintiff and the common council. The request was an acceptance of the obligation imposed so far as the statute rendered it essential to the exercise by the plaintiff of the franchise granted to it.

It is contended that the request, in view of the duty imposed upon the plaintiff, was productive of a contract between it and the city, perpetual and interminable, while the plaintiff retained its franchise and other property having relation to its exercise. While the request may have made the grant to the plaintiff effectual for the purpose provided by the statute, we think the plaintiff is not entitled upon any contract between it and the

city to the equitable relief sought, but it must depend upon the contract between it and the State furnished by the grant aided, so far as it legitimately may be, by the consideration to which such request may be entitled as bearing upon the operation and effect of the grant. The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges especially to put in mains, pipes and hydrants in its streets, nor could it lawfully by contract deny to itself the right to exercise the legislative powers vested in its common council. It can not well be claimed that any express power was delegated to the municipality to grant any exclusive franchises; and public policy will not permit the inference of authority to make a contract inconsistent with the continuously operative duty to make such by-laws, rules and regulations as the public interest or welfare of the city may require. (Milhau vs. Sharp, 27 N. Y., 611; New York vs. Second Ave. R. Co., 32 N. Y., 261; Richmond County Gaslight Co. vs. Middletown, 59 N. Y., 228; Gale vs. Kalamazoo, 23 Mich, 344; Logan vs. Paine, 43 Iowa, 524; Des Moines Gas Co. vs. Des Moines, 47 Iowa, 505; Norwich Gas Light Co. vs. Norwich City Gas Co., 25 Conn., 19.)

Reference has already been made to the provision of the city charter conferring upon it power to make by-laws, rules and regulations in relation to certain matters, including those of prevention of fire and of supplying water. And it may be observed that, in 1857, by an act amendatory of the city charter it was provided that the common council should 'have power to make, establish, publish, modify, ordain, amend or repeal ordinances, rules, regulations and by-laws' for the purpose, among others, 'to light the streets and public buildings of the city and to supply the city with water.' * * *

While the city may make contracts and assume obligations for legitimate purposes and become liable for failure to observe them, it is not consistent with the discretionary powers which the common council may be required to exercise in the discharge of their duty to the public, which they represent, for them to grant, by contract, exclusive privileges having the character of perpetuity. There is no such contract between the city and the plaintiff to support the claim for an injunction against the city. Further than that it is unnecessary to determine what contractual relations between them arose out of the request referred to, or what was its character, duration or effect. Nor is it necessary to add that the facts found by the trial court upon the subject of performance by the plaintiff would justify the denial of an injunction, if the claim for it were dependent upon a mere executory contract between those parties. In dealing with municipal corporations, parties are chargeable with knowledge of their powers as they are furnished only by statute. It is therefore not seen, upon the

facts of this case, that the actions were aided by any disability of the defendant city occasioned by estoppel *in pais.* * * * *

It may be assumed that what is embraced within the terms of the grant to the plaintiff is exclusive in such sense that it can not be covered by grant to another. That is to say a grant from a State to a company to construct and operate a bridge, ferry or telegraph gives to it the exclusive right to operate such ferry, bridge or telegraph, and no right can be given or taken to occupy the same space as the one so constructed or operated under the grant. The property in the company to that extent, and for such purpose exclusively belongs to it; but a similar franchise may not infringe such right although it may have the effect to impair its operative value. In such case, that would be the incidental consequence of the lawful competition and not an invasion of the prior grant. (Lehigh Water Co. App., 102 Pa. 515.) * * *

The effect of rival means for the supply of water to the city, upon the value of plaintiff's franchise, is not properly the subject of consideration upon this inquiry unless it bear upon the question of construction of its charter, for which purpose it does not seem important. The plaintiff's structure belonged to it exclusively, and it is its exclusive right to take water from its reservoirs, convey it through its mains and pipes, and to use its apparatus for the distribution and supply of water to the city and its inhabitants. The franchise of the plaintiff and all its property remain subject to its control and management. By force of the grant to it, the plaintiff took and has the right to maintain its structure, the privilege of supplying all the water the city or its inhabitants may take from it, but not the right to supply them with all the water they may be permitted to use. It may be that the demand upon it for supply will be lessened by the addition of other means which may be provided to bring water into the city. The supply embraced within the franchise of the plaintiff did not, by the terms of the grant or by necessary implication, shut out all other means of obtaining supply there. And in view of the demand of the rule of construction before referred to, such exclusive right in the grant of a public franchise can not rest upon inference, presumption or doubtful construction.

It, is, however, urged that the city can avail itself of no means other than through the plaintiff to obtain any water supply except by resuming and taking its property and powers in the manner prescribed in one of the sections, 26 and 29 of plaintiff's charter, to which reference has already been made. It appears that these provisions were inserted in the charter at the suggestion or request of the common council of the city. And that was evidently done to enable it, in the event referred to in

the one, and on the expiration of the time mentioned in the other section, if the interests of the city should require it, to take the matter of its water supply into its own management and control * * * It simply gave the city the opportunity in the events provided, to become possessed of the property which would constitute the plant of the plaintiff and be applied to the service of furnishing water to the city. This right was not made a legal duty upon the performance of which was dependent the power to use means other than through the plaintiff to obtain further means of water supply for the city. It was a privilege merely which it might or might not exercise at pleasure. * * * The defendant company has taken its charter from the State through the general act of the Legislature. Its powers enable it to enter into contract to furnish water to the city. The proposed contract does not, in terms, confer upon it any exclusive right to supply water to the city. It, therefore, violates no right which the plaintiff took by its grant from the State; and it was within the power of both defendants to make such a contract. * * *

These views lead to the conclusion that the obligation of the contract between the State and the plaintiff, represented by the franchise granted to the latter, is not and will not be impaired by the exercise by the defendant company of the privileges granted to it in the performance of the proposed contract between the two defendants." (116 N. Y., 167, 173, 189; S. C., 5 L. R. A., 516, 551.) See also Rockland Water Co. v. Camden etc. Co. (Maine) 1 L.R.A. 394; High on Inj. § 902.

The question, what is or is not an exclusive privilege and whether it can rest upon implication or must be conferred in express terms, was again before the Court of Appeals of New York *In Re* Brooklyn, 143 N. Y., 596, and the decision in the Syracuse case approved. The court said:

"In the Syracuse Water Company case it appeared that that company had been incorporated for the purpose of supplying water to the City of Syracuse and its inhabitants, and that that was the only means for such supply possessed by the city. It was claimed that its franchise conferred an exclusive right which would be invaded if the City Central Water Works Company, with which the City of Syracuse had contracted to furnish the city with water was permitted to exercise the privilege granted by the contract. The latter company was incorporated under the general act and this court, in its second division, held that the obligation of the contract between the state and the plaintiff represented by the franchise granted to the latter was not impaired by the exercise by the defendant company of the privilege granted to it in the performance of the proposed contract. Judge

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who delivered the opinion of the court, reviewed the
of the plaintiff's right in the light of adjudged cases,
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r as they are by the terms of the grant made exclusive
is reserved to grant and permit the exercise of compet-
val powers and privileges however injurious they may
e taken by the prior grantee.'"

erefore submitted that the allegations of the bill state
legal cognizance only and present no grounds for invok-
owers of a court of equity. The contract, if not ex-
d yet valid as to some of its provisions, is plain and
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the city is a plain legal right, cognizable only in a
w. As heretofore shown, the failure of the city to
from the water company, or to exercise its option to
itself proceeding to construct and operate water
ers upon the complainants no right to relief by in-
Syracuse Water Co. vs. Syracuse, 116 N. Y., 167;
Long, Minn., 51 N. W., 913; Re Brooklyn, 143 N. Y.,
s. City of Austin, 85 Texas, 520; See also Turnpike
e, 3 Wall, 210; Curtis vs. Whitney, 13 Wall, 68, 70;
as Co. vs. Hamilton, 146 U. S., 268; Colby University
igua et al., 69 Fed. Rep., 671, 672.

Rockland Water Company etc. Co. (Maine) 1 L.R.A. 388, 394; 24 Fed. Rep. 306, 28 High on Inj. § 902

l should be dismissed or the decree affirmed.

S. R. FISHER.
For Appellees.

No. 285. 44.

Add'l Brief of Fisher for Appellees

Filed Apr. 12, 1897

Office Supreme Court, U. S.
FILED,
APR12 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

Appeal From the Circuit Court of the United States, Western District of Texas.

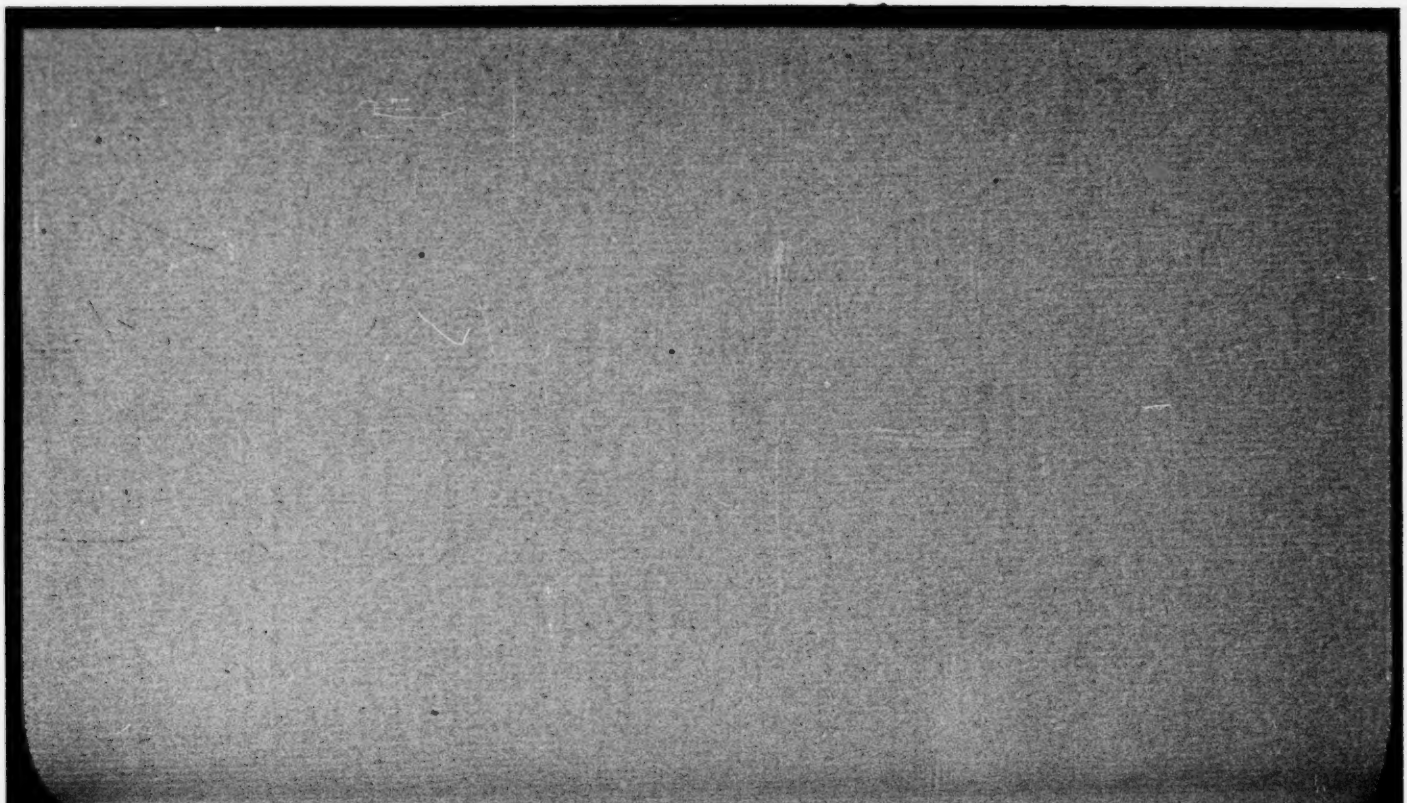
PENN MUTUAL LIFE INSURANCE COMPANY ET AL.
vs.
THE CITY OF AUSTIN ET AL.

NO. 285.

ADDITIONAL BRIEF FOR APPELLEES.

S. R. FISHER,
For Appellees.

HUTCHINGS PRINTING CO., AUSTIN.



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In further support of the contention that complainants are entitled to no relief in equity, it is respectfully insisted that the record discloses such laches on their part as to bar their right, if it ever existed, to relief by injunction. It affirmatively appears, from the bill and exhibits annexed thereto, that the City of Austin, through its taxpayers and council, took action as early as 1890 looking to the construction of a system of water and light works, to be put in operation immediately upon its completion without reference to the existence or non-existence of a contract for water supply with the City Water Company or other persons or corporation. It also appears therefrom that the money required to construct, complete and put in operation such a system as was contemplated, was $1,400,000.00, or some such large sum, and that it was to be raised by the issuance and sale of negotiable, interest-bearing bonds of the city, for the payment of the interest and sinking fund of which provision was made for the levy and collection of a special tax. The bill distinctly charges that the city and its officers, without reference to and in open disregard of the contract alleged to exist between the city and the Water company, had proceeded and were proceeding with the enterprise; that the city had already expended large sums of money in the construction of a dam across the Colorado river and that, in the further prosecution of the work,

it had entered into contracts requiring the expenditure of other large sums of money. Further it alleged, that the municipal authorities were actively engaged in laying pipes in the streets of the city, for the distribution of water for its use and that of its inhabitants, and that it was their purpose to press the construction of the works to a speedy completion and to maintain and operate a rival system (par. 36, Trans. 25). It is thus plain, that the construction of the system of water works by the city involved the expenditure of large sums of money; and it is fair to assume that, at the time the injunction was sought, the city had advanced a long ways towards the end in view, and had expended in the construction of its plant the greater part of the money it was thus authorized to expend. The averments, in substance, are that the dam had been completed at the expenditure of a large sum, that pipes were being laid, and that the works were nearing and being pressed to a speedy completion. As stated, it is apparent, from an inspection of the bill and the ordinances and charter of the city annexed thereto, that the money, necessary for the construction of works by the city, was required to be raised and was raised from the sale of negotiable bonds, and, as very large sums of money had been expended prior to the filing of the bill, it is but fair and reasonable to conclude that the bonds, from the sale of which the money was realized, were outstanding in the hands of innocent third parties. If complainants at any time had right to relief by injunction, and that right had been enforced at the inception of the enterprise and before the expenditure of large sums of money, no harm might have been done, but to grant such relief now would bring ruin to the people of the City of Austin, and irreparable injury to her welfare. Under these circumstances, it is submitted, that the laches of the complainants is clear, and that a court of equity will not extend relief. A court of equity requires reasonable diligence on the part of those seeking its aid and discourages laches by making it a bar to relief; therefore, a complainant on filing his bill for injunction must make it appear that he has used reasonable diligence in invoking the aid of the court, otherwise the relief will be denied.

"Nothing," said this court in *Brown v. County of Buena Vista*, 95 U. S., 160, "can call forth a court of equity into activity, but conscience, good faith and reasonable diligence. Where these

are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court." See also Foster v. Mansfield, etc., R. R. 146 U. S., 88, 100; Ware v. Galveston City Company, 146 U. S., 102, 115; Ranger v. City of New Orleans, 2 Woods, 143; Riverton Ferry Co. v. McKeesport & B. Co., 36 Atl. Rep., 136; City of Logansport v. Uhl, 99 Ind., 531, s. c. 50 Am. Rep. 109; Atty. Gen. v. N. Y., etc., R. Co., 24 N. J. Eq., 49; Traphagen v. Jersey City, 29 N. J. E[illegible] 206; 2 Pom. Eq. sec. 817.

In *Attorney General* [illegible] *v. N. Y. etc. Ry. Co.*, it was held that where the construction [illegible] an important public work has been permitted to proceed almost to completion, in full view of all the parties that could be affected thereby, and large expenditures have been made and liability incurred, and no action is taken to prevent the progress of the work for more than fourteen months, a Court of Chancery would not enjoin the further prosecution of the work.

In the case of *Traphagen v. Jersey City*, it was further held that where a suitor seeks to have a public improvement enjoined, he must not only show that some rights secured to him have been violated, and that he has no other adequate remedy, but he must also apply promptly, and that where by his laches he has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, an injunction will be refused, and he will be left to pursue his ordinary remedy at law.

As heretofore urged, it would seem clear, if the contract relied upon be not wholly void, that complainants have a full, complete and adequate remedy at law; but it is further insisted that, if complainants desired to negative the existence of an adequate remedy at law, it devolved upon them to allege facts showing or tending to show the inadequacy of such relief by alleging the insolvency of the defendant city, or its inability to respond to any demand that might be made upon it for damages resulting from breach of the contract. There is in the bill no allegation that the defendant city is insolvent, or not able, by the exercise of its taxing power, to discharge any demand resulting from breach of contract which may be estab-

lished against it. It would seem to be essential that the complainants should have alleged that the city was insolvent or that, after taking into consideration its municipal expenditures and liabilities, its taxable values and the amount of money that might be realized from the tax authorized to be levied and collected, it would be in no condition to meet any demand growing out of a breach of the contract. Neither the amount of the taxable values of the city nor the amount of its current or other expenses is given, so that the court, by referring to the taxing power of the city, might determine whether or not it had the ability to discharge any damage that might result from breach of the contract.

An examination of the cases relied upon by complainants, where jurisdiction of the Circuit Court was sustained on the ground that a Federal question was involved and relief by injunction accorded, will disclose, either. (1) That the contract or franchise under consideration was, in its terms, exclusive, and made by a State or municipality having the power to make an exclusive contract or to grant an exclusive franchise, and where no right was reserved in the grantor to revoke, modify or control the same by subsequent legislation; or (2) That the contract, made by a municipality having the power to make it, imposed in express terms an obligation on it not to do the thing sought to be enjoined, and which if done would result in irreparable injury or loss.

All the other cases, cited as bearing upon the questions here involved, were either actions at law seeking the recovery of hydrant rental, or proceedings to compel the levy and collection of a tax to pay the same, in which the city, while not seeking to establish works of its own or to contract with a rival company, was atempting to interpose against the demand for the value, or the contract price, of water furnished, the defense of *ultra vires* upon the ground that the contract was an exclusive one beyond the power of the city to make, or that it ran for a longer term of years than was authorized by law, or for some like reason, or were decisions by State courts construing local statutes; and, hence, are not authority for the contention that the complainants have a contract imposing upon the defendant

city an obligation not to exercise its power to construct and maintain water works of its own, and which entitles them to relief by injunction.

White v. City of Meadville et al., 177 Pa. St., 643, s. c. 35 Atl. Rep., 695, affords no support to complainants. That case involved a construction by the Supreme Court of Pennsylvania of the statutes of that State relating to the powers of water corporations and the powers of cities of the third class as to water supply. It distinctly shows that the ruling of the court was founded upon what it deemed the legislative intent in enacting the corporation act of April 29, 1874, as to the powers and franchises of water corporations organized thereunder, and the act of May 23, 1874, relating to municipal corporations. It simply held that, construing these two statutes together as statutes *in pari materia*, a city of the third class, in Pennsylvania, had the power to supply itself with water (1) by the erection and maintenance of a system of its own, or (2) by contract with a water company for the erection of a water works plant—said company then to have the exclusive right, under the law, to furnish water to the city, subject to certain conditions as to purchase. Further it was held, that the city, as to the method to be pursued for obtaining a water supply, was put to its election, and that, after having elected to supply itself by contract with a water corporation, it could not, under the law of that State, operate and maintain water works of its own in competition with the party with whom it had contracted. In short, the court held that, under the Pennsylvania statutes regulating the subject, a city of the third-class had the power to supply itself with water through works of its own, or by contract with a water company, but that it could not do both at the same time. The distinction between the Pennsylvania case and this case would seem to be obvious. But, if there should be entire agreement between the facts of that case and of this one, the decision of the Supreme Court of Texas in *Nalle v. City of Austin*, 85 Texas, 520, to the effect that the City of Austin had the power to erect and maintain its own water works, notwithstanding the existence of a contract with a water company, would seem to control.

In *Walla Walla Water Company v. City of Walla Walla et al.*, 60 Fed. Rep., 957, the water company having a contract with the

city sought to enjoin the city from proceeding to construct and erect works of its own. The charter of the city, granted to it in 1883 by special act of the Legislature, conferred upon it the following among other powers: * * * To erect and maintain water works, within or without the city limits, or to authorize the erection of same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water * * and to enact all ordinances and regulations necessary to carry the powers therein conferred into effect. * * To condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works and * * * to purchase or condemn water works already erected or which may be erected * *. To provide a sufficient supply of water and to levy and collect special taxes for these purposes * * *. To grant the right to use the streets of said city, to any person or association of persons, for a term not exceeding twenty-five years, for the purpose of laying gas or other pipes intended to furnish the inhabitants of said city with light or water; provided, always, that none of the rights or privileges granted should be exclusive nor prevent the council from granting the same rights to others. * *

In 1887, the city, pursuant to an ordinance authorizing the same, entered into a contract with the water company by which it was authorized to lay pipes in the streets of the city for conducting water and required to supply water for the use of the city for the extinguishment of fire, flushing gutters and all other municipal purposes for a period of twenty-five years. The contract expressly stipulated: "* * * * And this contract is voidable by the city of Walla Walla so far as it requires the payment of money upon the judgment of a court of competent jurisdiction whenever there shall be a substantial failure of such supply or a substantial failure on the part of the water company to keep or perform any agreement or covenant on its part herein specified or in this contract herein contained * * * and, until this contract has been avoided, the City of Walla Walla will not erect, maintain or become interested in any works except the one herein referred to save as hereinafter specified. Neither the existence of this contract nor the passage of ordinance Number 270 shall be construed to be or be a waiver of or relinquishment of any right of the city to take, condemn and pay

for the water rights and works of said company or any company at any time. * * * *." The water company on its part fully complied with all the requirements of the contract.

In 1893, an ordinance was passed providing for the creation of water works and the laying of pipes by the city, for supplying the city and its inhabitants with water, and for issuing bonds to provide the necessary funds for such purpose. The city, without providing for the condemnation or purchase of the works of the water company, proposed to erect its own plant and to become its competitor in the business of supplying the city and its inhabitants with water.

The water company sought an injunction on the ground that the action of the city, in passing the ordinance aforesaid and in proceeding thereunder to establish and maintain a system of water works of its own, would impair the obligation of the contract between it and the city. The injunction was granted, the court holding that, under the powers conferred upon the city of Walla Walla, it had authority to make the contract with the complainant, and that it had therein bound itself and expressly stipulated that it would not, during the period the contract was to run, undertake to supply itself and its inhabitants with water, unless it should first exercise its right to buy or condemn the water works of the complainant.

It does not affirmatively appear that the charter, in express terms, prohibited the city of Walla Walla from making a contract which would exclude it from exercising its right to construct and maintain a system of its own. The language is indefinite, and the prohibition against exclusiveness would seem to be explicit only in respect of any person or persons other than the city; however, the city expressly agreed not to erect water works and become a competitor of the water company during the period of the contract, unless it should exercise the right or power given to purchase or condemn the works. This, the court held, created an obligation within the protection of the contract clause of the constitution. The decision is not satisfactory in its reasoning, and does not seem to be in harmony with the current of authorities; but, it is submitted, that the case is clearly distinguishable from the one under consideration. The city of Walla Walla, by its charter, was given express authority to grant the right to any person or association of persons to lay pipes in the streets

of the city, for the purpose of furnishing water, for a term of twenty-five years—such right, however, not to be exclusive of the right of the city to grant a similar privilege to any other person. The charter, if not affirmatively authorizing, did not in terms prohibit the city from excluding itself, during the term of the contract, from exercising its power to erect works of its own, and, as shown, the city had expressly stipulated that it would not, during the period of the contract, erect, maintain or become interested in, any water works, except those of the water company with which it had the contract, and not with its works except in the manner specified, which was by condemnation or by purchase.

Westerly Water Works v. Town of Westerly, 75 Fed. Rep., 101, was a suit instituted in the Circuit Court of the United States to enjoin the town of Westerly from constructing and operating a system of water works. The town was authorized to construct water works and also to contract with third parties for a water supply. It adopted the latter course and granted to the complainant the right to construct water works and supply the town on certain conditions. After the complainant had constructed an adequate plant and was prepared to comply with its contract in all essentials, the town passed a vote to itself construct a water works plant. An injunction was granted upon the ground that the action of the city would impair the obligation of the contract.

The court held that the power to grant an exclusive privilege, except upon certain conditions, did not exist, that such conditions were not present in the contract of the complainant, and that such contract was not exclusive—and yet held that such non-exclusive contract could, in effect, be made exclusive by giving to it all the benefits and privileges that could attach to an exclusive contract expressly authorized by law. The decision seems to be rested mainly on the authority of the case of Walla Walla Water Company v. City of Walla Walla, supra. But as already shown, that case does not sustain the decision. It did not decide, that a non-exclusive contract could raise against the city an obligation not to engage in the business of furnishing water where it already had a contract for such purpose with a corporation. It simply decided, that the city of Walla Walla had express authority to make a contract for laying pipes and fur-

*This decision is in direct conflict with Smith *vs.* Town of Westerly, 35 Atl. Rep., 526, decided by the supreme court of Rhode Island.

nishing water for a period not to exceed twenty-five years; that it had authority by contract to bind itself not to engage, as a competitor with the water company with whom it had contracted, in the business of furnishing water to the city and its inhabitants during the period the contract was to run; and that it had expressly agreed by contract that it would not, during such period, become a competitor of the water company. Further, in the Westerly case the court, although distinctly recognizing the fact that its charter gave to the town of Westerly the power, without words of limitation or restriction on its exercise, to construct water works and the power to contract for a water supply, nevertheless held that, when the town entered into the contract with the water company to supply water for a term of years, its power to maintain and operate water works of its own, during such period, was suspended. It is respectfully submitted, that this case stands alone, that it does not correctly declare the law, and that it is not supported by the authorities to which it refers. ※

Columbus Water Co. v. Mayor, etc. of Columbus, 48 Kansas, 99, s. c. 15 L. R. A., 354, was an application for a writ of mandamus to compel the city to levy a tax to pay hydrant rental under a contract between the water company and the city.

The court, on demurrer to the petition, held, in substance: That, in Kansas, a city of the second-class had the power to enter into a contract with private parties or a corporation for water to be furnished to it for fire protection; that, when such a city had entered into a contract and there had been erected and maintained, at great expense, for a period of four years or more, a water works plant, and during that period the corporation owning the plant had furnished water in accordance with the contract entered into and recognized by the city—the city having levied the proper tax and paid the hydrant rental for three years and otherwise recognized the validity of the contract—the contract would not be held void because the city did not possess the power to make a contract for a period of twenty-one years.

The city itself was not attempting to erect and maintain a system of water works. The case was one in which the city was attempting to resist the imposition of a tax to pay hydrant rental for water furnished under the contract, upon the ground that

the contract was void because the city had attempted to make it for a period of twenty-one years. The court called attention to the fact that the question, whether the city had attempted to grant an exclusive franchise, was not material to the case before it; that it was not a question between contending water companies as to which should have certain privileges.

Illinois Trust, etc. Bank v. Arkansas City, 76 Fed. Rep., 272, was a suit against the city for water rental, which had accrued under a contract between the city and the water company. The case is certainly not applicable to the one at bar, the court holding that the contract, if void as to its exclusive feature, was, under repeated decisions of the Supreme Court of Kansas, valid notwithstanding it ran for a long term of years. It was not a case between a water works company, asserting an exclusive right to furnish water to the city and its inhabitants, and the city or a rival company denying the right and attempting to engage in a similar business; it was simply a suit to recover hydrant rental, under a contract between the city and the water company, in which the city sought to interpose against liability for rental the defense that the contract was void, first, because it was sought to be made exclusive and, second, because the city had no authority to make a contract to run for the period named. The city was not attempting to establish water works of its own nor to enter into a contract with another person or corporation. The court, in the progress, of the opinion, called attention directly to this fact and held that a city could not, in a suit brought to recover water rental, set up that the contract was *ultra vires* because it contained terms which might be construed as an attempt to make an exclusive contract, or because it ran for a long period of time. The court further said that, whether its view that the contract was not void because running for a long term of years was correct or not, the question was concluded by repeated decisions of the Supreme Court of Kansas holding that municipal corporations of that State could make a contract for the time the city in that instance had sought to bind itself, and that the court was bound by the decisions of the Supreme Court of Kansas determining and declaring the powers, possessed by its municipal corporations.

Judge Sanborn, in delivering the opinion of the court, stated

that, if a grant of a similar privilege, not exclusive, had been subsequently made by the city to another corporation and that corporation had proceeded to construct another system of water works, neither the company nor the city could maintain a bill to enjoin such proceeding, because, being beyond the power of the city to make a grant of an exclusive privilege, that portion of the grant would not sustain a bill to restrain the violation of its terms. He cited Jackson County Horse Ry. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. Rep., 306, 310; Omaha, etc. Ry. Co. v. Cable Tramway Co., 30 Fed. Rep., 324; Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. Rep., 529; Long v. Duluth, 49 Minn., 280, s. c. 51 N. W., 913.

The cases of New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S., 650; Water Works Co. v. Rivers, 115 U. S., 674; St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S., 644; Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683-687, and all other cases that have come under observation in which the jurisdiction of the Circuit Court has been sustained on the ground that a Federal question was involved and in which an injunction has been granted, were, as stated, cases where the franchise conferred upon the complainants was exclusive in its character, and made by the State or the municipality having authority to confer it, and in the absence of any constitutional prohibition, or provision, under which the exclusive character of the franchise might be revoked or recalled.

"The generally received doctrine now is that legislative acts, granting franchises to corporations, are to be strictly constructed in accordance with the terms of the grant, and that the grantee takes nothing by implication either as against the State or as against other grantees of similar franchises from the State. In order, therefore, to warrant relief in equity, against an invasion of or infringement upon the franchise, it must appear by the terms of the grant that the plaintiff is entitled to the exclusive enjoyment of the franchise in question; and unless this element of exclusiveness appears in the grant itself it will not be imported by implication. Unless, therefore, the grant of the franchise under which plaintiff claims is exclusive in its terms, equity will not interfere by injunction or restrain the operations of persons claiming the right to exercise a similar franchise under legislative authority.

And since an exclusive franchise can not be implied from a legislative grant, in the absence of express terms whereby it is made exclusive, it follows that a legislature may rightfully create a franchise which will conflict with one previously created, if the first were not, in express terms, exclusive of all others." 2 High on Injunctions, sec. 902 and authorities cited.

S. R. FISHER,
For Appellees.

No. 285 & 44.

Sup'l Brf. of Fisher, for Appellees

FILED.
APR 22 1897
JAMES H. McKENNEY,
CLERK

Filed April 22, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 285.

THE PENN MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLANTS,

vs.

THE CITY OF AUSTIN ET AL.

SUPPLEMENTAL BRIEF FOR APPELLEES.

The extracts from the act of 1875 (Gen. Laws Texas, ~~1895~~, 1875, page 126, section 31) and from the Revised Statutes of Texas, 1879 (article 374), cited by appellants at page 77 of their brief, have no application whatever. The statute, carried forward into the Revised Statutes as title XVII, in express terms applies to cities organized and acting under the general law and not to cities, like Austin, chartered by special act of the legislature (see title of act, Gen. Laws, 1875, page 113; also sections 1 and 157 and sections 340 and 341, title XVII, Rev. Stats.

Metzgar *vs.* Borough of Beaver Falls, 178 Pa., 1, S. C., 35

Atl., 1135, simply follows the case of White *vs.* Meadville, and affirms the construction therein placed by the court upon the Pennsylvania statutes relating to the powers of water corporations and the powers of cities of the third class as to water supply.

It is not perceived that the case of National Water Works Co. *vs.* Kansas City, 62 Fed. Rep., 863, has any relevancy here.

Atlantic Water Works Co. *vs.* Atlantic City, 39 N. J. Eq., 367; S. C., 6 Atl. Rep., 24, repeatedly cited and relied upon by appellees, seems to have been overruled in Atlantic City Water Works Co., 44 N. J. Eq., 427. At any rate, the court ruled that the decision made by the court in that case was wrong, and that the court had evidently overlooked certain provisions of the New Jersey constitution prohibiting the conferring of an exclusive privilege to furnish water.

S. R. Fisher,
Counsel for Appellees.